Supreme Court, U. S.
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No. 80-105

IN THE

Supreme Court of the United States

October Term, 1979

In re BEEF INDUSTRY ANTITRUST LITIGATION
M.D.L. DOCKET No. 248

R. DIRK AGEE, *et al.*,

Petitioner,

vs.

SAFEWAY STORES, INC., *et al.*,

Respondent.

CHAPPARAL CATTLE CORP., *et al.*,

Petitioner,

vs.

SAFEWAY STORES, INC., *et al.*,

Respondent.

BURKE PETERSEN, *et al.*,

Petitioner,

vs.

SAFEWAY STORES, INC., *et al.*,

Respondent.

JOHN O. VARIAN, *et al.*,

Petitioner,

vs.

SAFEWAY STORES, INC., *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lowell V. Summerhays, Esq.
Attorney for Petitioners

1220 Continental Bank Building
Salt Lake City, Utah 84101
(801) 355-5200

QUESTIONS PRESENTED

I

1. Do the principles espoused in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, rehearing denied 434 U.S. 881 (1977), which prevent indirect purchasers from maintaing a cause of action for illegal overcharge due to price-fixing, preclude the maintenance of a cause of action by plaintiffs/petitioners who, as producers - sellers of fat cattle, were forced to sell into a fixed, rigged market for wholesale beef, and were forced to sell at artificially depressed prices caused by defendants' conspiratorial practices attempting to monopolize and monopolizing the beef industry in violation of federal antitrust law.

II

1. Whether Plaintiffs/Petitioners' complaint alleging that "various other companies and individuals not named defendants in this complaint, participated as co-conspirators in the offenses charged herein and performed acts and made statements in furtherance thereof, and are made Parties hereto as Class Defendants," (App. A-81), reserving the right to specifically name each and all as defendants emphatically fails to demonstrate an allegation of conspiracy or combination to fix prices between the named defendants and middlemen.

2. Where Plaintiffs/Petitioners sought the filing of a timely and duly tendered amended complaint, was refusal to grant such filing in direct contradiction with the holdings of this Court and clear intendment of Rule 15 (a) of the Federal Rules of Civil Procedure.

A list of all the parties in the proceedings stated on the cover is found in the Complaints printed in the appendices.

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No._____

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Petitioners, R. Dirk Agee, Chapparral Cattle Corp., John O. Varian, Burke Petersen, et al., Trigg Cattle, Seven Rivers Cattle Co., and Sagebrush Cattle Feeders, Inc., et al., hereby petition that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered August 17, 1979.

OPINIONS BELOW

The Order of the United States District Court for the Northern District of Texas is appended at App. A-60. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 600 F.2d 1148 (5th Cir. 1979), and is appended at App. A-1. The denial of the Petition for Rehearing and Petition for Rehearing En Banc is appended at A-55.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment in the above-entitled actions, all cases appealed from the ruling of Judge Taylor of the Dallas Division of the United States District Court for the Northern District of Texas, on August 17, 1979. Rehearing was denied April 24, 1980, and the mandate was stayed pending disposition of this and other petitions. This Petition seeking determination and relief as provided in 28 U.S.C. Section 2106 was filed within ninety (90) days of the Denial of Rehearing in accordance with 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2101(c). The District Court had and continues to have jurisdiction pursuant to 28 U.S.C. Section 1337(a).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C., Section 1 provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 2 of the Sherman Act, 15 U.S.C., Section 2 provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction

thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 15 U.S.C., Section 15 provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Federal Rule of Civil Procedure 8(a), (e) and (f), 28 U.S.C. Rule 8(a), (e) and (f), provides:

Rule 8. General Rules of Pleading:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jur sdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative

and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficienty of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless or consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Federal Rule of Civil Procedure 15, 28 U.S.C., Rule 15(a), provides:

Rule 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend his pleading one as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

This is an antitrust action brought by Plaintiffs/Petitioners as fat cattle producers-sellers against Defendant supermarket chains and the supermarkets' trade association, for violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C., Sections 1 and 2, seeking injunctive relief and treble damages or injury to Plaintiffs/Petitioners' businesses and properties, 15 U.S.C., Section 15, 26. Such damages were the direct and proximate result of the defendants' unlawful conspiratorial actions to monopolize the beef industry resulting in the fixing and artificially depressing the price of fat cattle. Defendants' monopsonistic and oligopsonistic practices, which violated the federal antitrust laws, deprived Plaintiffs/Petitioners of a fair and reasonable price properly based upon the natural interaction of supply and demand in a free market system, a price which would have existed but for the anticompetitive, unlawful acts of Defendants as alleged.

The cause of action in *Agee, et al.*, case was filed by the Plaintiffs/Petitioners on November 5, 1975 in the United States District Court, District of Nevada; Plaintiffs/Petitioners in the Petersen, et al., cause of action filed suit on June 27, 1977 in the United States District Court for the Northern District of Texas, Dallas Division; the Plaintiffs/Petitioners in the *Chapparal Cattle Corporation* cause of action filed suit on March 16, 1976 in the United States District Court for the District of Utah, Central Division. *Varian, et al.*, filed suit on September 17, 1976 in the United States District Court, Central District of California. The Plaintiffs/Petitioners are individual and corporate cattle ranchers and feeders engaged in the business of producing fattened cattle to be sold when ready for slaughter. The *Agee* cause of action originally named seventeen (17) chain store defendants and the *Petersen, et al.* cause of action originally named nineteen (19) chain store defendants. *Varian, et al.* named twenty-four (24) defendants. *Chapparral Cattle Corporation, et al.*, cause of action originally named twenty-one (21) chain store defendants. Defendants filed a Motion to Dismiss and for Judgment on the Pleadings under Rule 12(b)(6) and

12(c) of the Federal Rules of Civil Procedure on June 17, 1977, predicated on the then recent decision of *Illinois Brick v. Illinois,* supra.

The Trial Court entered its Order of Dismissal on the Rule 12(b) Motion, basing its reasoning on the holding of *Illinois Brick Co. v. Illinois,* supra. The District Court's Final Order, after Plaintiffs had duly tendered amendments to their complaints, was entered December 9, 1977, dismissing with prejudice. (App. A-60).

The Plaintiffs duly appealed to the United States Circuit Court of Appeals for the Fifth Circuit. On August 17, 1979, that Court entered judgment, reversing and remanding all the consolidated appealed cases to the District Court for the Northern District of Texas for further proceedings. The Mandate was stayed. (App. A-52 and A-56). The judgment:

(1) agreed with the District Court that Illinois Brick applies to an indirect producer-seller, but held that a producer-seller forced to sell in a rigged market could maintain his civil antitrust action on a "functional equivalent" to a "cost-plus exception" to Illinois Brick;

(2) that the Court held that the complaint failed to allege a co-conspiracy between supermarket, the chain stores, and the packers; and

(3) that the District Court did not err in sustaining Defendants' Rule 12(b) Motion to Dismiss with Prejudice and to deny plaintiffs to amend under Rule 15, Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT

I. THIS CASE SHOULD BE REVIEWED BECAUSE THE APPLICATION OF *ILLINOIS BRICK CO. V. ILLINOIS*, TO MONOPSONISTIC AND OLIGONPSONISTIC PRACTTICES WHICH VIOLATE THE FEDERAL ANTITRUST LAWS IS OF MAJOR IMPORTANCE TO THE ADMINISTRATION OF JUSTICE AND THE APPLICATION OF THE ANTITRUSΓ LAWS.

The interpretation by this Court of the language of Section 4 of the Clayton Act (15 U.S.C., Section 15) has consistently provided the broadest coverage to those persons injured by antitrust violations. As noted by this Court:

> "The statute does not confine its protection to consumers, to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. United States v. Socony-Vacuum Oil Co. 310 U.S. 150, 84 L.Ed. 1129, 60 S. Ct. 811; American Tobacco Co. v. United States, 328 U.S. 781, 90 L.Ed. 1575, 66 S. Ct. 1125. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. United States v. South-Eastern Underwriters Asso. supra (322 U.S. at 553, 88 L.Ed. 1457, 64 S. Ct. 1162)." Mandeville Island Farms v. American Crystal Sugar Company, 334 U.S. 219 (1948) rehearing denied.

This Court has recognized the seriousness of monopsony or oligopsony at the dominant position of the market place. If a violation of the antitrust laws occurs in this critical position, the entire market place is directly affected and injured. As this Court noted in *United States v. Patten*, 226 U.S. 525 (1912), with regard to allegations concerning the defendant's alleged "cornering" of the cotton market:

> "It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart

> the usual operation of the laws of supply and demand, withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition." *Id.* at 542.

In another monopsony case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court again recognized that a conspiracy, which exists in that position of the market where a commodity is purchased and put into the stream of commerce is the critical position of the entire market. "And those who are in that strategic position would have it in their power to destroy or drastically impair the competitive system." *Id.* at 221.

Therefore, to violate the antitrust laws in this key position is not just an individualized injury, which occurs when there is an overcharge passed through a chain of distribution to an ultimate consumer as in *Illinois Brick*, supra, but is instead an injury which permeates the entire market place, "directly interfering with the free play of market forces." *Socony-Vacuum*, 310, U.S. at 221. In the present case, Plaintiffs have alleged that Defendants have conspired together to restrain trade in the entire market for the production, slaughter and purchase of beef. Defendants have chosen as their tool, for the manipulation of this market, the price they have agreed to pay for fresh frozen processed beef. Defendants, who existed in the key position of the market into which Plaintiffs were forced to sell their live cattle which are a perishable commodity and in the short-term inelastic.

The Fifth Circuit, in the opinion below, stated:

> "The Plaintiff's theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly is that the activities of the alleged price-fixing conspiracy depressed the wholesale prices generally . . ." In re Beef Industry Antitrust Litigation, 600 F. 2d 1148 (5th Cir. 1979) (App. A-40, n. 24).

Thus, the gravamen of Plaintiffs' complaint is that Plaintiffs are damaged, by the artificially depressed prices in the market into which they are compelled to sell a perishable fungible product.

The Fifth Circuit refused to recognize the distinction between a monopsony or an oligopsony which violates the antitrust laws in a dominant position of an industry's productive chain, and that which was addressed by this Court in the Illinois Brick decision, where an overcharge was passed through several levels of distribution finally arriving at the ultimate consumer having been distorted by each level of distribution. The case presently before this Court is clearly not an "overcharge" case, but a case in which the Defendants chose price as their tool to manipulate an entire market in which Plaintiffs participated, and in whcih Plaintiffs were damaged. Simply because the Defendants chose to use pricing as their tool does not mean that *Illinois Brick* is instantaneously involved.

In interpreting *Illinois Brick*, the Third Circuit stated:

> "A different problem is presented where prices are fixed below the competitive market price or where Defendants engage in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions, or monopolization, since Defendants' benefits in those instances are not so readily ascertainable and may not be sufficient to compensate 'those individuals whose protection is the primary purpose of the antitrust laws.' In such circumstances Courts have awarded damages based upon the amount of injury suffered by Plaintiffs rather than the benefits derived by the Defendants." *Midwest Paper Products v. Continental Group, Inc.*, 596 F. 2d 573, 585 n. 47 (3rd Cir. 1979.)

Plaintiffs, in the present case, do not seek to disgorge from the Defendants profits illegally obtained which is the theory upon which *Illinois Brick* ban is based, (See Harvard L. Rev. 220, 226, (1977), but rather seek to be compensated for losses they have suffered. Defendants used their position of dominance in the middle of the productive chain of the market place in

order to fix prices below competitive market prices, and thus effectively control the entire market place. Plaintiffs are simply seeking to recover those damages they have sustained because of such interference with the free play of market forces, rather than trying to recoup any of the benefits which may have been derived by the Defendants.

The Fifth Circuit's Opinion below states that this Court's decision in *Illinois Brick* is to have "general applications" (App. A-26), including those cases in which price is used in order to monopolize a market in violation of Section 2 of the Sherman Act.

Surely this Court did not overrule *sub silentio* ninety years of antitrust law in practice in *Illinois Brick* nor did it intend for *Illinois Brick* to be applied to all Section 1 and 2 cases, regardless of their form, whenever pricing was involved. To hold thus, would be contrary to the prior rulings of this Court, the legislative intent of the Sherman and Clayton Acts, and discourage the enforcement of the antitrust laws which is contrary to this Court's holding in *Hanover Shoe v. United Shoe Machine Corp.*, 392 U.S. 481 (1968).

It is submitted that if the holding of *Illinois Brick* is found to have any application to the analytically distinct factual situation of the present case, then this court should apply a balancing test, rather than extend the per se rule enunciated in *Illinois Brick*. See Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation, 63 Cornell L. Rev. 309, 333 (1978). This Court has expressed recently its hesitancy to apply oer se rules indiscriminately. See *Continental T.V., Inc. v. Sylvania, Inc.*, 433 U.S. 36, L.Ed. 2d 568 (1977). A major concern of this Court as expressed in both *Hanover Shoe* and *Illinois Brick* was whether ultimate consumers would have a substantial deterrent effect upon antitrust violators. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L.Ed. 2d 707, 97 S. Ct. 2061 and *Hanover Shoe Manufacturing Corporation*, 392 U.S. 481 20 L.Ed. 2d 1231, 88 S. Ct. 2224 (1968). Sellers into a rigged market risk a loss of their entire business, as noted in the Fifth Circuit Court's opinion below, and, therefore,

are essential to effectuate the deterrence function of antitrust lawsuits. This Court should review and determine that the standard to be applied in cases involving a monopsony or oligopsony under Section 2 of the Sherman Act and the depression of prices throughout an entire market allows recovery to groups in the position of Plaintiff/Petitioners, who may be best situated to enforce the antitrust laws and suffered injury reasonably foreseeable by the named Defendants.

II. THERE IS A GROWING DIVERGENCE AMONG THE CIRCUIT COURTS ON THE ISSUE OF THE APPLICATION AND SCOPE OF *ILLINOIS BRICK*, AND UNLESS DIRECTION IS GIVEN BY THIS COURT, THE CONFUSION GENERATED WILL LEAD TO AN EROSION OF THE ANTITRUST LAWS.

Since the announcement of the decision in *Illinois Brick* in 1977, the various courts throughout the United States have been groping with the decision in the context of enumerable motions for summary judgment and motions under Rule 12(b) for dismissal for failure to state a cause of action.

The Third Circuit has held that they will apply *Illinois Brick* only in an overcharge situation, in which the illegal overcharge is passed through a chain of distribution. *Midwest Paper*, supra. This line of thinking has been followed by other Courts within that circuit, *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091 (D.C. Md. 1979), and in *In Re Japanese Electronic Products Antitrust Litigation*, M.D.L. No. 189 (E.D. Pa. Opinion filed May 5, 1980). Both of these cases base their opinions, in large part, on Note 47 of *Midwest Paper Products*, supra. In *Dart Drug Corp.*, the Court states:

> "The foregoing review of the rationale of *Illinois Brick* makes it abundantly clear that the case bars suit only in those situations where Plaintiff's injury is premised on a 'overcharge' in where, in order to prove that injury, Plaintiff must also demonstrate that persons in the chain of distribution between Plaintiff and the antitrust violator passed on the overcharge to Plaintiff." 480 F. Supp. at 1101.

In *In Re Japanese Electronic Products Antitrust Litigation*, supra, the Court declines to apply *Illinois Brick* where, "the amount of injury suffered by the Plaintiff rather than the benefits derived by the Defendants . . . "are the measure of damages, again citing Note 47 of *Midwest Paper Products.*

The Seventh Circuit in the case of *Fontana Aviation, Inc. v. Cessna Aircraft Company*, No. 79-1863 (7th Cir. Opinion filed March 19, 1980), refused to apply *Illinois Brick* where the defendant's pricing policy was alleged to be part of a "multi-faceted conspiracy" causing competitive injury to the plaintiff. Here again, the plaintiff was suing for the damage he suffered by reason of the violation, rather than the disgorgement of illegally obtained profits by the defendant. The plaintiff was only seeking to recover the amount of injury he had suffered as a proximate cause of the violation. See *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906).

In *In Re Uranium Antitrust Litigation*, 473 F. Supp. 393 (N.D. Ill. 1979), the District Court again focuses on how plaintiff was injured in determining whether or not to apply *Illinois Brick.* There the Court stated:

> "Counterclaimants fit within the class of . . .'those that have been injured by alleged restraints imposed by Defendant on competitive forces in the economy.'" *Id.* at 403.

The Fifth Circuit, although recognizing Plaintiffs' claim of damage to the market (App. A-40 N. 24), and that Plaintiffs' complaint further alleges that "(c) Plaintiffs' sold their livestock for less than they would have in an open and competitive market" (App. A-98), held that *Illinois Brick* was of such general application that it applied to a case where the market was allegedly manipulated by use of price. The Fifth Circuit's tortuous reasoning finally arrives at a point wherein they will allow Plaintiffs to continue their lawsuit, applying *Illinois Brick*, involving the "cost-plus" contract exception.

The Fifth Circuit further stated that it saw nothing "special about monopsony or oligopsony price fixing cases that justifies treating them from monopoly price-fixing cases . . ." (App.

A-26). This statement is clearly at odds with the Third Circuit's opinion in *Midwest Paper* where it recognizes a difference between an undercharge and overcharge case. *Midwest Paper*, 596 F. 2d at 585, n. 47.

Unless this Court addressed the issues raised in this case (especially in light of the Fifth Circuit's prophalactic application of *Illinois Brick*), there is a serious likelihood that there will be further divergence of the already multiple points of view regarding the scope and application of *Illinois Brick* within the Circuits, to the end that there will be non-uniform application of the antitrust laws within the United States.

III. THE FAILURE OF THE COURT OF APPEALS BELOW TO FIND THAT PLAINTIFF/PETITIONER'S COMPLAINT SUFFICIENTLY ALLEGES A VERTICAL CONSPIRACY OR COMBINATION AMONG THE NAMED DEFENDANTS AND MIDDLEMEN RAISES AN IMPORTANT QUESTION IN REGARD TO THE UNDERLYING POLICY AND PROPER SCOPE OF RULES 8(a), (e) AND (f) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rules (a), (e) and (f) of the Federal Rules of Civil Procedure require only "simplified notice pleading . . ." (*Conley v. Gibson*, 355 U.S. 41, 48 (1957): "No technical forms of pleadings are required"; and "All pleadings shall be so construed to do substantial justice."

Plaintiffs/Petitioners' First Amended and Substituted Complaint alleges:

> CO-CONSPIRATORS
>
> Various other companies and individuals not named Defendants in this complaint, participated as co-conspirators in the offenses charged herein and performed acts and made statements in furtherance thereof.

It is axiomatic that when a complaint is the subject of motions under Rules 12(b)(6) or 12(c) of the Federal Rules of Civil Procedure, the Court must take all allegations in the complaint as true, together with all inferences and intendments

thereto; only if there is no set of facts under which the Plaintiff could recover, should the Court grant a dismissal with prejudice. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Walker Process Equip. v. Food Mach. Chem. Corp.*, 382 U.S. 172, 175 (1965); *Conley v. Gibson*, supra.

Allegations of the existence of a vertical conspiracy removes the case "from the reach of *Illinois Brick.*" 63 Cornell L. Rev. 309, 331 (1978). A plaintiff suing under the federal antitrust laws is not required to sue all members of the combination of conspiracy. *American Motor Inns, Inc., v. Holiday Inns, Inc.*, 521 R. 2d 1230, 1244 N. 42 (3rd. Cir. 1975); *National Wrestling Alliance v. Myers*, 325 F. 2d 768, 775 (8th Cir. 1963); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F. 2d 1, 8 (9th Cir. 1963); *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23 (6th Cir. 1903) aff'd 203, U.S. 390 (1906).

When viewing the Amended and Substituted Complaint in the light most favorable to the Plaintiffs, giving the Plaintiffs the benefit of all reasonable intendments and inferences thereto and liberally construing the same, the Amended and Substituted Complaint supports a finding that a vertical conspiracy in violation of the antitrust laws has existed between the Defendant supermarkets and middlemen which depressed fat cattle prices - the target of which has been the cattle producer. The Amended and Substituted Complaint alleges that other co-conspirators and other concurrent conspiracies have jointly and/or severally and/or concurrently injured Plaintiffs in their businesses and properties and performed acts and made statements in furtherance thereof.

It is well established that "a vertical combination or combination of non-competitors may conspire to restrain unreasonably the interstate trade and commerce of third parties and thereby subject themselves to the prohibitions of the Sherman Act." *United States v. General Motors Corp.*, 121 F. 2d 376, 404 (7th Cir. 1941), cert. denied, 314 U.S. 618, rehearing denied, 314 U.S. 708 (1941). Indeed, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960), involved a three-tier conspiracy

among manufacturers, wholesalers and retail sellers aimed at retail purchasers. Further, it is well established that facts similar to those alleged in this Amended and Substituted Complaint can establish a combination and conspiracy in restraint of trade and a combination to monopolize aimed at producers such as the Plaintiff fat cattle producers (*American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Swift & Co. v. United States*, 196 U.S. 375 (1905), and such allegations give rise to a private damage action under Section 4 of the Clayton Act by producers such as the Plaintiffs. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

Paragraph 2(c) of Plaintiffs/Petitioners' complaints states that the Defendants and co-conspirators:

> "(c) utilize market dominance and economic power to depress and maintain at artificially low and constant levels the arm-wholesale price marketing or spread when the wholesale-retail price margin or spread is and has been experiencing consistent increases and unexplained, non-cost justified, abrupt rises . . ."

This allegation clearly states concerted activity and agreements between the named defendants and middlemen as unnamed co-conspirators to fix prices. See *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 98 L. Ed. 273, 74 S. Ct. 257 (1953); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 83, L. Ed. 610, 59 S. Ct. 467 (1939); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 92 L. Ed. 2d 1260, 68 S. Ct. 915.

Therefore, the scope and principles of Rules 8(a), (e) and (f) of the Federal Rules of Civil Procedure should be found to have intended the inclusion of the denomination of "unnamed co-conspirators."

IV. THIS CASE SHOULD BE REVIEWED BY THIS COURT BECAUSE THE SCOPE AND INTENT OF RULE 15(a) WAS NOT TO BE INTERPRETED AS DENYING A RIGHT TO AMEND PRIOR TO DISCOVERY, EFFECTIVELY PRECLUDING DAMAGED ANTITRUST PLAINIFFS FROM A PROPER CAUSE OF ACTION AND ALLOWING ANTITRUST VIOLATIONS TO ESCAPE LIABILITY.

Rule 15(a) of the Federal Rules of Civil Procedure (App. A-110) provides that the Trial Court shall freely grant leave to amend the pleadings "when justice so requires." As stated by this Court, "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). Accord, *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F. 2d 69 (5th Cir. 1961).

Although the District Court concluded that the actions were appropriately dismissed with prejudice under *Illinois Brick* and that "justice does not require leave to amend" (App. A-64), the District Court failed to make any findings to support its conclusions.

> "The grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Accord, *Griggs v. Hinds Junior College*, 563 F. 2d 179 (5th Cir. 1977); *Scott v. Eversole Mortuary*, 522 F. 3d 1110 (9th Cir. 1975); *Sarter v. Mays*, 491 F. 2d 675 (5th Cir. 1974).

Even though the District Court provided no reasons for its refusal to allow the Plaintiffs leave to amend, the Circuit Court affirmed the refusal upon its independent conclustions that there was undue delay and amendment would be futile. (App. A-31 through A-34). The Circuit Court erred in concluding that there was undue delay in the absence of supportive findings

that indicate that the Defendants are prejudiced thereby. *Griggs v. Hinds Junior College*, supra, *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, supra. The Circuit Court also erred in concluding that granting leave to amend would be futile because: *Illinois Brick* applies to overcharges paid by purchasers - not to sellers into a rigged market; plaintiffs are not required to sue all co-conspirators; and "the Plaintiffs' theory of damages is not in all respects a pass-on type of theory." (App. A-40 n.24).

> "Granting leave to amend is especially appropriate, in cases such as this, when the trial court has dismissed the complaint for failure to state a claim. *Griggs v. Hinds Junior College*, supra, at 180."

The Circuit Court recognized, in holding that Plaintiffs had stated a claim under the cost-plus exception to *Illinois Brick*, that there are facts, if proved, that would allow Plaintiffs to recover under the antitrust law of the United States.

> "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. *Foman v. Davis*, supra.

Therefore, the Circuit Court erred in affirming the District Court's denial of Plaintiffs' Motion for leave to amend their pleadings to include an alternate theory of recovery.

In sum, a denial of Plaintiffs' right to amend permits alleged antitrust wrongdoers to go "scot free", precludes assertion of a proper cause of action and unfairly interferes with antitrust Plaintiffs' rights to prove their damages.

CONCLUSION

In the interests of assuring effective enforcement of the federal antitrust laws, insuring even-handed administration of justice, and protecting the existence of a competitive and free market system, the Petitioners respectfully request that this Court grant Petitioners' Petition for a Writ of Certiorari in these causes of action.

RESPECTFULLY SUBMITTED this 22nd day of July, 1980.

Robinson, Guyon, Summerhays & Barnes

By _____
Lowell V. Summerhays

PROOF OF SERVICE

I HEREBY CERTIFY that I mailed, postage prepaid, a true and correct copy of the foregoing to the following counsel this 22nd day of July, 1980:

Ben L. Krage, Esq.
1300 Bryan Tower
Dallas, Texas 75201

Robert R. Eidsmoe, Esq.
200 Home Federal Bldg.
Sioux City, Iowa 51101

Burt A. Braverman, Esq.
Suite 200
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Les Hawkins, Esq.
2801 Fleur Drive
Des Moines, Iowa 50321

John A. Cochrane, Esq.
Suite 500
360 Wabasha Street
St. Paul, Minnesota 55101

Robert O. Vaughn, Esq.
530 Idaho Street
Elko, Nevada 89801

James W. Witherspoon, Esq.
P. O. Box 1818
Hereford, Texas 79045

Roger J. Allen, Esq.
Suite 3838
2001 Bryan Tower
Dallas, Texas 75201

Joseph M. Alioto, Esq.
Suite 2100
111 Sutter Street
San Francisco, CA

W. Randolph Elliott, Esq.
40th Floor
2001 Bryan Tower
Dallas, Texas 75201

Attorneys for
Plaintiffs/Appellants

Wilson W. Herndon, Esq.
1200 One Main Place
Dallas, Texas 74250

Jess B. Hawley, Esq.
One Capital Center 7th Floor
Boise, Idaho 83701

Sheldon S. Toll, Esq.
2290 First National Building
Detroit, Michigan 48226

Benjamin M. Quigg, Esq.
123 South Broad Street
Philadelphia, PA 19109

Roy Lewis Shults, Esq.
1800 Century Park East
Ninth Floor
Los Angeles, CA 90067

Sylvan Rapaport, Esq.
c/o Corman's Inc.
P. O. Box 446
Detroit, Michigan 48232

Dudley Chambers, Esq.
4300 First National Bank Bldg.
Dallas, Texas 75202

E. Link Beck, Esq.
P. O. Box 2800
El Paso, Texas 79999

John D. Leech, Esq.
1800 Central National Bank Bldg.
Cleveland, Ohio 44114

David A. Rosen, Esq.
1370 Avenue of Americas
New York, New York 10019

H. Kenneth Kudon, Esq.
Suite 1010 Bender Bldg.
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

Kenneth A. Plevan, Esq.
919 Third Avenue
New York, New York 10022

Thomas F. Curnin, Esq.
80 Pine Street
New York, New York 10005

Jeffrey S. Davidson, Esq.
200 East Randolph Drive
Chicago, Illinois 60601

Franklin P. Auwarter, Esq.
231 South La Salle Street
Chicago, Illinois 60604

Peter D. Standish, Esq.
767 Fifth Avenue
New York, New York 10022

Wilson W. Herndon, Esq.
1200 One Main Place
Dallas, Texas 74250

C. Loring Jetton, Jr., Esq.
1666 K Street, N.W.
Washington, D.C. 20006

James F. Rill, Esq.
Suite 308
1055 Thomas Jefferson St., N.W.
Washington, D.C. 20007

John A. Gilliam, Esq.
2200 First National Bank Bldg.
Dallas, Texas 75202

B. Thomas McElroy, Esq.
2505 Republic National Bank Bldg.
Dallas, Texas 75201

William H. Tinsley, Esq.
1900 Mercantile Dallas Bldg.
Dallas, Texas 75201

Robert L. Blumenthal, Esq.
3000 One Main Place
Dallas, Texas 75250

Theodore A. Groenke, Esq.
111 West Monroe Street
Chicago, Illinois 60603

Alexander E. Bennett, Esq.
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Jerry Buchmeyer, Esq.
2300 Republic National Bank Bldg.
Dallas, Texas 74201

John L. Hauer, Esq.
2800 Republic National Bank Bldg.
Dallas, Texas 74201

Lawrence G. Newman, Esq.
4330 Republic National Bank Bldg.
Dallas, Texas 75201

Robin P. Hartmann, Esq.
4444 First International Bldg.
Dallas, Texas 74270

Les J. Weinstein, Esq.
28th Floor
3435 Wilshire Blvd.
Los Angeles, California 90010

Richard W. Odgers, Esq.
225 Bush Street
San Francisco, CA 94104

Donald B. Holbrook, Esq.
800 Walker Bank Building
Salt Lake City, Utah 84111

Robert D. Paul, Esq.
28 State Street
Boston, Massachusetts 02109

Jerome G. Shapiro, Esq.
One Wall Street
New York, New York 10005

Michael E. Bress, Esq.
2300 First National Bank Bldg.
Minneapolis, Minnesota 55402

W. B. West, III, Esq.
2424 First National Bank Bldg.
Dallas, Texas 75202

Stanley E. Neely, Esq.
3600 Republic Bank Tower
Dallas, Texas 75201

T. L. Caudle, III, Esq.
3600 First National Bank Bldg.
Dallas, Texas 75202

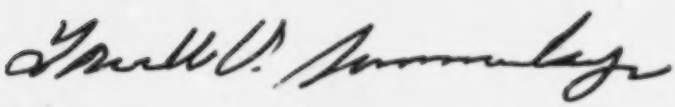
Timothy J. Sargent, Esq.
51st Floor
707 Wilshire Blvd.
Los Angeles, CA 90017

Ronald L. Olson, Esq.
612 South Flower Street
Los Angeles, CA 90017

Chester Bedell, Esq.
1500 Barnett Bank Bldg.
112 West Adams Street
Jacksonville, Florida 32202

Charles P. Storey, Esq.
5400 First International Bank
Dallas, Texas 75270

Attorneys for Defendants/Appellees



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